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Betty C. Thomas

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SISKIYOU

A. J. SYLVA,

Plaintiff,

-vs-

NO. 24482

WILLIAM J. GUARDIA, et al.,

Defendants.

OPINION AND DECISION

The court will consider first the issue as to whether or not defendants had the right to change their point of diversion. The law appears to be clear that they have a right to change the place of diversion to a point higher up the stream provided the rights of others are not injuriously affected thereby.

It is the court's opinion that the plaintiffs nor anyone else is injuriously affected by this upstream change of the place of diversion. In contrast thereto if the court required defendant to return to the original point of diversion the defendant would suffer rather significant damages. The court finds no forfeiture of this right as a consequence of the 1955 agreement and adopts the defendant's reasoning as set forth in his brief as being correct on that issue.

The court finds the 1951 agreement to be bona fide and in addition finds that the plaintiffs acquired an easement to the Thomason Ditch under a claim of right and that they have

1 been in actual, open, visible, continuous, uninterrupted possession
2 and use of the same for the requisite time. Along with this
3 easement the plaintiffs have the right to use the Guardia Road
4 from the County Road to the point of diversion plus the right to
5 do such maintenance as is required for the proper use of the
6 ditch, gully, and the policing of the diversion, such rights to
7 be exercised in a reasonable manner so as not to increase
8 injuriously the burden upon the servient tenement.

9 The evidence is overwhelmingly to the effect that the
10 Guardias and their predecessor, Mr. Thomason, used the two small
11 pipes in the Thomason Ditch above Guardia's house since about
12 the year 1955. This use was continuous, adverse, open and
13 notorious and thus a prescriptive right was acquired and has
14 vested in the defendants. This right is limited to its present
15 and past use and is to be exercised in a reasonable manner with
16 no undue waste of the water.

17 Although the evidence on the issue of rotation is not
18 as clear in the court's mind as on some of the other issues it
19 is still the court's opinion that there would be less chance of
20 any waste of the water during an extremely dry year if the
21 rotation was every five (5) days rather than seven (7) and it is
22 so ordered. The rotation time is also based upon the evidence.
23 Defendant is ordered to remove his own diversion pipe on the
24 fifth day by 8 p.m., and plaintiff can remove same if defendant
25 fails to do so but the court emphasizes that the order is binding
26 on the defendants and to keep peace between these neighbors urges
27 him to be diligent about this removal.

28 The court at this time has no jurisdiction over Mr. Cook
29 but requests that he join with the plaintiff and the defendant in
30 the use of a watermaster in order to terminate this seemingly
31 endless litigation over the waters of Willow Creek.

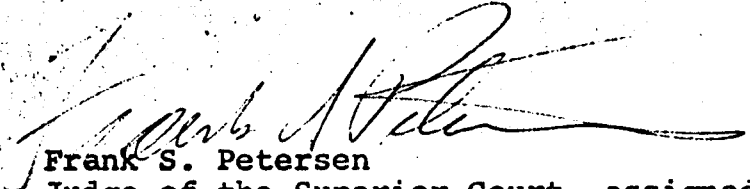
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1 Therefore it is ordered that the Department of Water
2 Resources of the State of California is appointed to supervise
3 through the agency of a watermaster the distribution of the waters
4 of Willow Creek among the parties hereto in accordance with their
5 respective rights as established by the agreement of June 30, 1955
6 and the decrees of this court.

7 Plaintiff to prepare the formal order.

8 DATED: December 17, 1971.

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Frank S. Petersen
Judge of the Superior Court, assigned